

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





76-1113

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

*against*

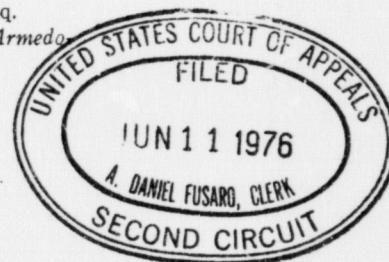
FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

*Defendants-Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF FOR APPELLANT ARMEDO-SARMIENTO**

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## TABLE OF CONTENTS

	<u>PAGE</u>
Preliminary Statement.....	1
Statement of Facts.....	2
Issues Presented.....	31
ARGUMENT:	
POINT I-The district court erred in denying without a hearing appellant Sarmiento's motion to suppress the evidence seized from apartment 6A at 327 West 30th Street on the ground that he lacked standing to object to the seizure.....	32
POINT II-The district court erred in failing to declare a mistrial after appellant Sarmiento's right of confrontation guaranteed by the Sixth Amendment was violated by the improper use of a co-defendant's statement implicating him in the alleged conspiracy.....	38
POINT III- Sarmiento was prejudiced because of the variance resulting from proof of multipel conspiracies.....	47
POINT IV-The improper comments by the prosecution in the opening statement coupled with the inflammatory and unfair closing remarks of the prosecution amounts to prosecutorial misconduct and deprived Sarmiento of a fair trail.....	49
POINT V-Fundamental errors of the court 's charge to the jury require reversal.....	50
Conclusion.....	51



TABLE OF AUTHORITIES

	<u>PAGE</u>
<u>Baker v. United States</u> , 401 F. 2d 958 (CA DC 1958).....	35
<u>Brown v. United States</u> , 411 U.S. 223 (1973).....	33, 36, 43
<u>Bruton v. United States</u> , 391 U.S. 123 (1968).....	38, 39, 41
<u>Harrington v. California</u> , 395 U.D. 250 (1969).....	43, 44
<u>Krulewitch v. United States</u> , 336 U.S. 440.....	42
<u>People v. Salazar</u> , 83 Misc. 2d 922 (1975).....	37
<u>Schneble v. Florida</u> , 405 U.S. 427 (1972).....	43
<u>United States v. Bozza</u> , 365 F. 2d 206 (CA2 1966)...	42
<u>United States v. Jeffers</u> , 342 U.S. 48 (1951).....	35
<u>United States v. Wilcox</u> , 357 F. Supp. 514 (E.D. Pa. 1973).....	35

PRELIMINARY STATEMENT

Francisco Adriano Armedo-Sarmiento appeals from a judgment entered in the United States District Court for the Southern District of New York (Cannella, J.) on March 1, 1976, convicting him of conspiracy to possess and distribute cocaine, in violation of Section 846 of Title 21, United States Code, and of conspiracy to import cocaine, in violation of Section 963 of Title 21, United States Code.

The indictment in Count One charged Sarmiento with conspiracy together with other defendants to import, possess and distribute cocaine and in Count Two charged Sarmiento with conspiracy together with other defendants to import, possess and distribute marijuana.

At a trial at the end of the government's case Judge Cannella granted Sarmiento's motion for a judgment of acquittal on Count Two and submitted Count One to the jury. The jury found Sarmiento guilty on Count One and the district court sentenced him to a term of imprisonment for 15 years, a special parole term of five years, a fine of \$25,000.00 and the costs of prosecution.



STATEMENT OF FACTS\*

On February 13, 1974, at 10:50 am. Sarmiento telephoned Mario Rodriguez and asked Rodriguez to tell Alberto Bravo to see him about Bernardo Roldan. (No. 1026, 2/13/74).\*\*

Later that month on February 22nd, at 12:45 pm. Sarmiento spoke to Rodriguez and asked her to tell Juan that the priest had some things ready for him and to call. (No. 1523, 2/22/74).

On February 23rd, at 6:55 pm. Juan Mesa called Alberto Bravo at the Plaza 50 Hotel. Mesa asked Bravo to sell him something because he needed it badly. Bravo told Mesa there was nothing for sale and said that if Mono\*\*\*had "the paper ready" Mesa should call him. (No. 1591, 2/23/74).

On February 24th, at 9:00 pm. Sarmiento called the Rodriguez apartment and asked for Mario. The maid told him, Mario was not in and he then asked for Juan Mesa. He was told that Mesa was not there either but that the two of them were at Mesa's

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- \* The evidence is stated in the view most favorable to the government
  - \*\* These references are to the transcripts of telephone conversations
  - \*\*\* Nickname for Francisco Adriano Armedo-Sarmiento

apartment where there was no telephone. Sarmiento identifying himself as Bernardo's pal, left a message requesting that either of them call him. (No. 631, 2/24/74).

On February 25th, at 11:00 am. Sarmiento telephoned the Rodriguez apartment and spoke to Carlos Vasquez. Vasquez told him that Juan had not arrived and Sarmiento asked Carlos to tell Juan that he had what the priest had fixed. Vasquez then asked Sarmiento to tell El Tio to call. Sarmiento said all right and then said that another round was ready which was the best of the best. (No. 1646, 2/25/74).

The next day, February 26th Sarmiento telephoned the Rodriguez apartment at 12:19 pm. and spoke with Estella. He said he was calling on behalf of Alberto to get the address of Ramiro's Beauty Salon. Estella gave him the number and he thanked her and told her to tell Juan that he had the carton. (No. 1717, 2/26/74).

The same day at 4:05 pm. Carlos Vasquez and Juan Mesa met Sarmiento outside an apartment building located at 215 East 64th Street in Manhattan. All three then entered the building (3395). About 45 minutes later Vasquez and Mesa came out of the building and drove to 80-15 41st Avenue in Queens (3425).



On March 19th, at 7:24 pm. Sarmiento called a telephone number looking for Bernardo. Instead of getting Bernardo he got Juan Mesa. Mesa asked him whether he had the things and he replied that it was on the way. They also talked about Alberto and Bruno Bravo. (No. 389, 3/19/74).

On April 2nd, at about 1:00 pm. Sarmiento met Ruben Roldan in front of the apartment building located at 215 East 64th Street. They got into a green Mercury and drove across the 59th Street bridge to the La Latina Restaurant on Roosevelt Avenue in Queens. They stayed there for a short while and then drove to 51-17 Van Loon Street. Nobody was home and Sarmiento left a note (3434-3441, 3443). At about 4:00 pm. at 94th Street and 37th Avenue in Queens, Sarmiento, Rev. Mejia and Oscar Perez met in front of the Los Americas Travel Agency. They talked for about ten minutes and then Sarmiento and Rev. Mejia got in a cab and went to Third Avenue and 63rd Street. There they got out of the cab. Rev. Mejia made several calls and Sarmiento left and went to the apartment.

On April 15th, at 10:00 am. Rodriguez entered 215 East 64th Street carrying a black valise. About an hour later he left carrying the same valise (3427-3428).

At about 1:00 pm. in front of a restaurant at 53rd Street and Second Avenue Sarmiento, Beatrice Valencia and an unknown male got out of a car driven by Ruben Roldan and entered the restaurant. About an hour later they left the restaurant and drove away (4228-4230).

At 2:10 pm. that same day at 215 East 64th Street Sarmiento, Ruben Roldan and a female entered a car and drove to Park Avenue and 40th Street. There, Sarmiento got out, met an unknown male, and they both entered a building (3742-3743).

On April 16th, at about 2:00 pm. Sarmiento exited a car in front of Rodriguez's apartment building in Queens. He entered Rodriguez's apartment with a small brown package and left several minutes later. He entered the car and drove away (6535-6536).

On May 2nd, at 3:05 pm. Sarmiento, Carlos Guarin, and a female left 215 East 64th Street, stopped and talked for a moment and then walked toward Third Avenue (3960).

The next day, May 3rd at 5:30 pm. Marconi Roldan and Bernardo Roldan entered the apartment on East 64th Street (4526). About an hour later Marconi and another person drove from Third Avenue and 64th Street to 1626 Lexington Avenue where they entered with Marconi carrying a brown paper bag (4416).



At about 8:05 pm. they both left and returned to 215 East 64th Street (4527) and entered the apartment. A few minutes later Arturo Gonzalez entered the apartment with an attache case and a brown bag (4527). The brown bag was taken by Bernardo Roldan and everyone then sat down at a table. Arturo Gonzalez wrote something and then the venetian blinds were lowered (4529). Even with the blinds lowered Sarmiento and Bernardo Roldan could be seen. They stood up; picked up the bag and placed it in the closet (4529). Bernardo Roldan, Sarmiento and Arturo Gonzalez then left the apartment. At 9:25 pm. Bernardo Roldan, a person named Hamilton, Marconi Roldan, Ruben Roldan and Sarmiento drove to 177th Street and St. Nicholas Avenue. Sarmiento and Ruben Roldan got out of the car and Ruben Roldan went into a restaurant while Sarmiento talked to Rodrigo Roldan (4418). Ruben Roldan came out of the restaurant and the three talked on the corner. Sarmiento left the conversation and walked across the street to the El Moro Bar. Ruben Roldan and Rodrigo Roldan followed a moment later. At about 10:15 pm. Sarmiento and Ruben Roldan left the bar and walked to a public telephone where Ruben Roldan made a call (4418). He hung up and they both waited at the telephone booth for about fifty minutes. The telephone

rang; Sarmiento answered it and talked until 11:15 pm. (4419). He and Ruben Roldan then went back into the bar and Ruben Roldan left the bar again at 11:45 pm. and walked west on 177th Street. About a half an hour later Sarmiento, Hamilton and another man left the bar and walked to 608-14 west 177th Street (4419). Ruben Roldan left this building at 2:20 am. and Sarmiento and Hamilton left a short time later (4420). Sarmiento and Hamilton then entered the bar, then left and returned to 608-14 west 177th Street. Later, Bernardo Roldan, Marconi Roldan, Hamilton and Rodrigo Roldan left 608 West 177th Street and drove to the East 64th Street apartment (4420). Sarmiento and Hamilton entered the apartment building; Bernardo Roldan and Rodrigo Roldan talked for a while and then drove away (4421).

At 9:15 am. in the morning Alberto Bravo called Sarmiento from Colombia. Sarmiento asked Bravo to get him a small motor and to leave it at Bernardo's house. Sarmiento told Alberto that he would not be able to get the vials for about a week. Bravo then told him it was all right for Abraham to work on a matter for 50%. Bravo asked him to call Libardo and give him the number and to tell Libardo that he was working on his thing. They discussed other matters and Sarmiento indicated there was some difficulty in getting the material. (No. 1, 5/5/74).

At 9:26 pm. that evening Lionel Duque called



Sarmiento from Colombia and Sarmiento told him someone had left to go to Colombia via Panama. (No. 21, 5/4/74).

Two days later on May 6th, at 11:16 am. Bruno Bravo called Sarmiento from Colombia. Sarmiento told him that he had some vials and Bravo told him to have them changed with a girl's assistance. Bravo then instructed him to send them by registered mail to a post office box. At 12:07 pm. Sarmiento received a telephone call from Beatrice Valencia and she asked how to get to his apartment. He gave her the address and told her to take a taxi. (No. 90, 5/6/74).

At 12:09 pm. Ruben Roldan called Sarmiento and commented that it was strange Hamilton had not returned. He said that he had an errand to do (No. 91, 5/6/74). A short time later Hamilton and Marconi Roldan entered the apartment building. Elsewhere at 65th Street and Second Avenue Sarmiento and Beatrice Valencia entered a bank and went to a teller's window (3772). They finished at the bank and returned to the apartment where Marconi Roldan and Hamilton were (3869-3870). While at the apartment Ruben Roldan called and spoke to Hamilton. Hamilton said that he wanted to talk to him about something and told him he would be over in one half hour. (No. 94, 5/6/74).

Shortly thereafter Sarmiento went down stairs to the street and was joined a minute later by Beatrice Valencia. Simultaneously they were joined by Ruben Roldan and Beatrice Valencia went back to the apartment (3922). Sarmiento and Ruben Roldan talked and Sarmiento then handed him an envelope and Ruben Roldan walked towards Second Avenue. Sarmiento was then joined by the others and they all walked towards Second Avenue. Sarmiento was then joined by the others and they all walked towards Second Avenue (3922).

About 1:15 pm. Beatrice Valencia went into the East River Savings Bank on Third Avenue (3870) and at 1:30 pm. Ruben Roldan entered the Chemical Bank on Second Avenue (3774).

At 6:08 pm. Libardo Gill called Sarmiento and told him that he had practically all of it left and his people were restless. At 6:35 pm. Ruben Roldan and Beatrice Valencia left the apartment and drove to the Tittle Tattle Bar (3950). At 6:55 pm. Arturo Gonzalez called Sarmiento. Gonzalez explained to him what the procedure was regarding the inspection and clearance of a shipment of furniture and they discussed the problems they were having with Castillo in regard to it. In addition Sarmiento mentioned that



\$2500.00 had been taken from the apartment (No. 107, 5/16/74). A short time later Marconi Roldan called and Sarmiento told him that money had been taken from the apartment. (No. 109, 5/16/74). At 7:45 pm. Sarmiento called Marconi Roldan back and they again discussed the stolen money. (No. 114, 5/6/74). Later Sarmiento called his mother in Colombia. She told him Bernardo had received the message and said that Bernardo did not have the \$200,000. He said that he was going to send a whole machine. (No. 120, 5/5/74). At 11:15 pm. Hamilton called Sarmiento and they discussed the stolen money. Sarmiento insinuated that he had taken the money. No. 124, 5/6/74).

The next day at 1:30 am. Bernardo Roldan called Sarmiento from Panama. Sarmiento told him that someone had stolen \$2500.00 when he had left the apartment to purchase money orders. (No. 162, 5/7/74). Later that day at 10:03 am. Bruno Bravo called Sarmiento and Sarmiento told him about the missing money. Bravo said not to worry about it and gave Sarmiento Leon Velez's telephone number (No. 127, 5/7/74). Sarmiento then called Leon and told him he had just spoken to Bravo. Sarmiento asked Velez to help him

mail somethings to Bravo. They discussed how to send the things and they arranged to meet. (No. 130, 5/7/74). Marconi Roldan called Sarmiento at 11:36 am. and Sarmiento told him Hamilton had come the night before but he had not allowed him in the apartment. They continued to discuss the stolen money. At 12:28 pm. Arturo Gonzalez called Sarmiento and asked if the people in Miami had called. Sarmiento said no. Gonzalez told him that he had spoken with Cacheton the night before and Sarmiento asked if Cacheton would be able to go there.

At 1:00 pm., in front of the apartment building Ruben Roldan, Marconi Roldan, Hamilton and Abraham met next to a car with an open trunk. They stayed there a short while and then left (3950-3954).

At 4:57 pm. that afternoon Sarmiento called Mario Rodriguez and told him about the stolen money. Rodriguez said that he thought Libardo had called earlier. Sarmiento said that with respect to the money it was good that Libardo had given him the thing. At 5:00 pm. Sarmiento spoke to Jorge Gonzalez. They discussed the problem concerning the importation and shipping matter and Sarmiento told him of the missing money.

At 5:23 pm. Sarmiento called the Gill's apartment and talked to Carmen. He told her about the



missing money and asked her to tell Libardo to call him. (No. 150, 5/7/74). At 6:25 pm. Arturo Gonzalez called Sarmiento and told him about the shipment that he was trying to locate. He said it was still in Colombia and they discussed other shipments. Sarmiento told him about the stolen money. (No. 154, 5/7/74). At 7:40 pm. Sarmiento left the apartment carrying a shoe box. He went to a car containing three men and handed them the box. The men looked at the box and then handed it back to him (4148-4139). Sarmiento with the box then got into another car occupied by a man and a woman. They drove to 51-17 Van Loon Street in Queens. All three went into the building there, stayed for about twenty-five minutes, then left and drove to Roosevelt Avenue and National Street. Sarmiento made a call and then drove to 58-35 Granger Street and entered the building. They remained there for about an hour and a half and then left and drove to 61-25 98th Street (4139-4142).

On May 8th, at 9:25 am. Jorge Gonzalez called Sarmiento. Sarmiento asked him if Arturo was there and Gonzalez responded that he was expected later. Sarmiento said that Bernardo had left everything well organized and that half had been gathered. Ten minutes later Libardo Gill called Sarmiento and Sarmiento told

him about the stolen money. Gill asked if the little thing was ready and Sarmiento replied yes. (No. 166, 5/8/74). At 11:25 am. Sarmiento entered a taxi cab and went to 88th Street and Amsterdam Avenue where he met Carlos Guarin. Sarmiento then entered 580 Amsterdam Avenue and exited shortly thereafter. He walked to 89th Street and Amsterdam Avenue with Carlos Guarin and entered the building while Guarin waited outside. Guarin then met a woman and they both entered 580 Amsterdam Avenue. At 1:20 pm. Sarmiento, Carlos Guarin and the woman exited the building and drove to 215 East 64th Street where Sarmiento got out of the car. At 1:45 pm. Sarmiento went to a bank located at 64th Street and Third Avenue. At 5:45 pm. Sarmiento telephoned Leon Velez. Velez told him to tell "El Negro" that as soon as he received the thing to let him know. Sarmiento said that he was short thirteen things that Libardo Gill had given to him. They agreed to talk the next day. (No. 191, 5/8/74).

At 10:45 pm. Bruno Bravo called Sarmiento from Panama. Sarmiento told him that he had given 45½ vials to Leon the day before and he had more for him. Sarmiento also told him about the stolen money. (No. 206, 5/8/74).

The next day May 9th, at 8:01 am. Bruno Bravo



called again. They discussed Arturo Gonzalez's efforts to locate a shipment and the compensation that he would be getting. They also discussed the stolen money and the giving of 45½ vials to Leon. Sarmiento said he was waiting for Leon to take the rest of them. (No. 211, 5/9/74). At 9:56 am. Leon Velez called Sarmiento and they arranged to meet in a half an hour. (No. 220, 5/9/74).

At about 10:30 am. Leon Velez met Sarmiento on the corner of 51st Street and Fifth Avenue and Sarmiento gave him a box. They then entered a luncheonette and left a little while later each going in separate directions.

Later at 12:30 pm. Sarmiento, Carlos Guarin, and Lola exited 580 Amsterdam Avenue and entered a car. Carmen Gill and two men walked up to the car and Gill talked to them. The two men then left and Lola and Gill entered 580 Amsterdam Avenue. A short time later Lola came out got into the car and they all left (4238-4240).

At 5:49 pm. Mario Rodriguez called Sarmiento and told him he had to vacate the apartment and that the car had been loaded. Rodriguez told him to relax because tickets could be purchased at the airport. (No. 249, 5/9/74).

At 8:00 pm. Sarmiento and Carlos Guarin left an apartment located at 58-35 Granger Street and drove to Roosevelt Avenue and National Street. Later Guarin returned to the apartment.

On May 10th, at 1:05 pm. Mario Rodriguez placed a call from the apartment to Mr. Molina in Madrid, Spain. Rodriguez told him that there was a shirt in Miami that cost twenty-two but that someone had to go to Miami and get it. Sarmiento then talked to Molina and when Molina started asking about what Sarmiento wanted Sarmiento replied "this is no business of mine". Rodriguez then continued the conversation and they talked about a man who had a new route to Chicago where it sells for twenty-four.

At 1:45 pm. on May 10th, Sarmiento, Mario, and Estella Rodriguez and Carlos Vasquez left the apartment. On the street they separated with Sarmiento and Mario Rodriguez walking east and Estella Rodriguez and Vasquez walking west (4372). They met around the corner. Estella Rodriguez and Vasquez then entered the Chemical Bank on 65th Street and then left and joined the others. Everyone then drove to 73rd Street and Third Avenue where Estella Rodriguez and Vasquez got out of the car and went into separate banks (4373). Sarmiento and Mario Rodriguez then continued driving to 79th Street and Third Avenue where Sarmiento



went into a bank. After Estella Rodriguez and Vasquez went into some other banks they all went back to the apartment (4374).

On May 12th, at 10:12 am. Sarmiento called a man in New Jersey. In the conversation he referred to a person named Edgar and told the person to telephone someone because he was interested in disposing of something. Sarmiento then asked if the person had been given a message to claim some shirts. Sarmiento asked if the receipt from the Los Americanos for \$3,000 pesos had been found. They then talked about Marconi sending some things and Sarmiento then talked to a woman about suits and pants. (No. 297, 5/12/74). At 11:30 am. Sarmiento called Marconi Roldan. Sarmiento told him that he had come from Queens and that he could take the machine or thing. (No. 300, 5/12/74).

On May 13th, at 1:51 pm. Alberto Bravo called Sarmiento. They mentioned El Cacheton in the conversation and talked about Bernardo who was to arrive in Colombia. They also discussed the missing money and talked about settling the account. At 6:20 pm. Sarmiento called Ruben Roldan and Roldan told him that he needed several shirts. (No. 361, 5/13/74). At 6:22 pm.

Sarmiento called Father Mejia and asked him to call Hamilton because he had to give him some things. They talked about the Los Americas problem. Five minutes later Sarmiento called Marconi Roldan and told him that he had talked to the priest and the problem should be solved. (No. 363, 5/13/74).

At 7:15 pm. Ruben Roldan and Marconi Roldan carrying a shoe box entered the apartment. About five minutes later Father Mejia and another man entered. They all talked in the apartment and then Ruben Roldan left. Thereafter Father Mejia and the man left and drove away in a red Mustang. Fifteen minutes after that Sarmiento and Marconi Roldan left.

Later that night at 10:30 pm. Father Mejia made a telephone call to Sarmiento (4590). He told Sarmiento that a man would take three bibles and then said that he would call the next day at 9:00 am.

At 1:00 am. Father Mejia called Sarmiento again and told him the man would keep three for him and then deliver them all. (No. 379, 5/14/74). At 10:37 am. Sarmiento called the Rodriguez apartment and spoke to Carlitos. Carlitos told Mono that he had been waiting for Chicle and that he had never arrived. Sarmiento said that he would see Carlos and Libardo and Carlitos asked him to tell them that he had been



waiting for days for a person. (No. 383, 5/11/74).

At 2:47 pm. Sarmiento spoke to Arturo Gonzalez and Gonzalez asked him to let him know when anything arrived. Sarmiento mentioned that he had sound-  
ed off to Leon. In addition he talked about getting fifteen hundred from Bruno. (No. 393, 5/14/74). At 3:11 pm. Libardo Gill called Sarmiento and told him that there was a man who would buy some pencils. Gill had the impression that this person was associated with Sarmiento. Sarmiento told him there was another shipment of pencils and they discussed various prices. (No. 396, 5/14/74).

On May 16th at 8:11 am. Sarmiento called Libardo Gill and Gill told him that he had done a small transaction with another person. Mono also told him that El Tio had solved a problem that existed. (No. 427, 5/16/74). About an hour later at 9:16 am. Sarmiento called Ruben Roldan. Ruben Roldan told him that things were no good because they were not turning out right. Sarmiento questioned why he had not done it with Sarmiento and Ruben Roldan replied that the car was no good; that it was very battered. Sarmiento told him to bring it because there was another kid who might take it. (No. 437, 5/16/74). Sarmiento called back and asked if Roldan could pick him up. He said

he could not. (No. 439, 5/16/74).

At 12:17 pm. Arturo Gonzalez called Sarmiento and said that he had told someone to ask about El Cacheton. Sarmiento said that Alberto would pay. (No. 444, 5/16/74). Later Ernesto Budero called Sarmiento. Budero said Bernardo had given him the address of the place where Bernardo had bought a luminous fountain and asked if Sarmiento knew of it. Sarmiento told him that he did not but that maybe Bernardo's nephew would know. Budero said that he would call back the next day. (No. 446, 5/16/74). At 5:57 pm. Sarmiento called the Gonzalez apartment and talked to Jorge Gonzalez. Sarmiento asked him to tell Arturo that he must wait for a call and that he is having trouble with Los Americos and Olivo. Gonzalez said he wanted to contact Carlos Guarin and they talked about that. They also talked about Alberto and finances. (No. 453, 5/16/74). Later at 9:20 pm. Ruben Roldan called Sarmiento and Sarmiento asked if the crap had come through. Roldan said it had not and then said he had a client for the car. Sarmiento replied that he did not want it given to the same person that took the other three. (No. 472, 5/16/74).

On May 17th at 10:52 am. Sarmiento called the Gill's apartment and talked to a man. Sarmiento asked for Libardo but he was not here. The man said



that Gill was looking for another person who had requested all of it. All of it totaled six and it was determined that Carlos would supply four and Gill the other two. They talked about collecting 500 a piece. (No. 479, 5/17/74). At 11:00 am. Sarmiento called Ruben Roldan and asked if he had disposed of it. Roldan replied no because it had no aroma. (No. 480, 5/17/74). At 11:02 am. Sarmiento tried to call Medellen, Colombia. At 1:00 pm. a man called Sarmiento and they talked about the fact that Libardo Gill was putting up two and another person was putting up four. This was contrary to Alberto's orders. (No. 491, 5/17/74). At 5:06 pm. Sarmiento called Bernardo Roldan in Colombia. They talked about money; that a photographer had stolen it all; and accounts for Bruno. They also discussed San Cocho and they discussed the importation of automobiles. (No. 513, 5/17/74).

On May 18th at 11:38 am. Ernesto Argudelo called Mono. Mono told him that he had spoken to Bernardo but that Bernardo did not have the address. (No. 522, 5/18/74). Argudelo called back and Sarmiento told him that he had received no answer. (No. 524, 5/18/74).

On May 19th, at 10:38 am. Sarmiento called

Honduras and asked to speak to Julian. Julian was not there and he spoke to a woman who said that Julian had left two days ago. (No. 537, 5/16/74). At 7:35 pm. Sarmiento called Marconi Roldan and asked if Bernardo had called. He was told that he had not. Sarmiento told him that a person had called and asked about a luminous fountain. Roldan replied that he thought it was two filters that Bernardo had. (No. 543, 5/19/74).

On May 20th, at 6:28 am. a man called Sarmiento and told him that he had sold the banged up car for 23.50. (No. 552, 5/20/74). At 7:47 am. Sarmiento called Gonzalez's apartment and spoke with Jorge Gonzalez. Sarmiento asked Gonzalez to ask Arturo to find out about the motors which were being exported to Colombia. Gonzalez told him that Olivo had an argument with Oscar Perez and they discussed Perez's illegal practices. (No. 553, 5/20/74). At 11:10 am. Sarmiento called the Rodriguez apartment and left a message for Mario with Estella that the car was in bad shape and not to ride in it. (No. 565, 5/20/74). At 7:36 pm. Sarmiento called New Jersey and asked a woman whether the other car was fixed. (No. 584, 5/20/74).

On May 21st, at 9:03 am. Sarmiento called Jorge Gonzalez and asked if Arturo had left a message about the motor. (No. 595, 5/21/74).



On May 22nd, at 11:26 am. Marconi Roldan called Sarmiento. Sarmiento told him that he would call Libardo Gill about the few cents. (No. 624, 5/22/74). At 1:19 pm. Sarmiento called Libardo Gill and asked for \$1500.00. They arranged to meet at 3:00 pm. (No. 627, 5/22/74). At 2:25 pm. Marconi Roldan called Sarmiento and Sarmiento told him that he was waiting for Libardo to bring the money so that he could give it to him. (No. 628, 5/22/74).

At 4:00 pm. Libardo Gill entered the East 64th Street apartment and about ten minutes later he and Sarmiento left (4589). They then drove to 77th Street and Central West where Sarmiento got out of the car and Gill then drove to 580 Amsterdam Avenue. There, Gill entered the building and took the elevator to the third floor (4731). At 8:20 pm. Mario Rodriguez telephoned Sarmiento to see if he had anything. Sarmiento said that he thought Carlitos had some. Rodriguez said he knew that already and said he was dealing it some place else. Sarmiento said it was very scarce and Rodriguez asked what the prices were if he had any. (No. 640, 5/22/74).

On May 23rd at 12:36 am. Ruben Roldan called Sarmiento and told him that he had not gotten rid of it. Sarmiento told him to bring it over in the morning.

(No. 654, 5/23/74). At 10:41 am. Sarmiento called Jorge Gonzalez and told him that he had been in Libardo Gill's car the day before and the police had stopped them. Gonzalez told him that the thing with the motors had not worked out. (No. 657, 5/23/74). At 2:0 pm. Carlos called Sarmiento and asked him what was new with Cachete. Sarmiento told him that he had become sick and gave him Libardo Gill's telephone number. (No. 664, 5/22/74). At 7:14 am. a person named Omar called Sarmiento and Sarmiento told him that Eduardo had not arrived. Sarmiento also said that Gill told him that he, referring to Omar, had not been able to get Pepe's telephone number. (No. 670, 5/23/74). At 9:29 pm. Ruben Roldan called Sarmiento and Sarmiento asked him to bring the two Quixote books over for a man that wanted to read them. (No. 677, 5/23/74).

On May 24th at 1:35 pm. a man named Chano called Sarmiento. Chano told him he wanted to settle for his things. In response to this Sarmiento told him about the stolen money and told him to talk to Bruno, Griselda, Mejia, and Alberto. At 8:52 pm. Ruben Roldan called Sarmiento and Sarmiento said that if he was coming over he would call the man. Roldan who was at Beatrice Valencia's house said he would come over with the two machines. (No. 693, 5/24/74).



At 9:50 pm. Sarmiento entered the Apollo Diner in Queens and was joined there by Ruben Roldan. They both walked to 51-17 Van Loon Street and talked to a woman. They then left and drove to a building located at 6125 98th Street. Sarmiento entered the building and a short time later left with Mario Rodriguez and Carlos Vasquez. They went from there to Callaway Street. On May 25th at 8:58 am. Sarmiento called Gurian in Honduras. He told Gur. that he would arrive the next day to see what could be organized. (No. 719, 5/25/74).

On May 26th at 9:43 am. Sarmiento called Ruben Roldan and told him that he was going to Miami and asked him to bring the bathing suit over. Sarmiento told him that if he was not there, the bathing suit should be left with the doorman. Sarmiento then asked what happened with the boy and Roldan replied that the boy was working. Sarmiento told him to look for the money because a thing had to be paid for. (No. 724, 5/26/74).

On May 27th at 10:23 am. Sarmiento called Libardo Gill and told him that El Poli wanted to talk to him urgently. Gill told Sarmiento to give him the thing and they arranged to meet at about 1:00 pm. (No. 766, 5/27/74). At 1:00 pm. Sarmiento left Victor's Restaurant at 71st Street and Columbus Avenue and went

by cab to the Gill apartment. At 4:02 pm. Sarmiento telephoned Jorge Gonzalez and asked if Arturo had left anything for him. Gonzalez said no. Sarmiento told Gonzalez about the fact that he was leaving on a trip and he asked Gonzalez to mail him papers from Suarez and Company. (No. 784, 5/27/74). At 8:05 pm. Sarmiento boarded a flight to Miami, Florida.

On June 28th, at 10:29 pm. Sarmiento called Mario Rodriguez and told him that he had just returned from his trip. Sarmiento asked Rodriguez if he had been able to send a person to Raul and Rodriguez said no. Sarmiento asked if he had had any problems and if he had much work. Sarmiento also asked if the factory was still working and Rodriguez replied a little. (No. 10, 6/28/74).

On June 29th, at 10:40 am. Sarmiento called Oscar and told him where they would meet. (No. 17, 6/29/74). At 10:50 am. Sarmiento called Marconi Roldan and told him to tell Ivan that the delivery should be made directly to New York. Sarmiento asked about Bernardo and some passports. (No. 28, 6/29/74). Later Mario Rodriguez and Sarmiento spoke. Rodriguez said that he had been trying to get Bernardo and Sarmiento said he had been waiting on a corner for someone but the person never appeared. He asked Rodriguez to pick



him up. Rodriguez agreed because he had ten shirts to take to Manhattan. Sarmiento told him not to go to Manhattan because he did not want to go. (No. 51, 6/29/74).

On June 30th, at about 3:40 pm. Sarmiento, Libardo Gill and others were seated in the La Floresa Restaurant in Queens. A little while later Sarmiento, Gill, Estrada and another man left the restaurant and got into Gill's car. They drove to 4872 37th Street in Queens and entered a building at that location. After a period of time they exited the building and drove to Flushing Meadow Park. They went into the Park and left the park about two hours later. Sarmiento and Gill got into a car and drove to 67th Street and Central Park West. On route they stopped and Sarmiento made several telephone calls. Gill dropped Sarmiento off and drove away. Sarmiento entered Central Park and a short time later he went to Victor's Restaurant on Columbus Avenue to talk to Mario Rodriguez.

On July 2nd, at 1:50 pm. Sarmiento talked to Chucho. Chucho said that some papers had arrived and Sarmiento responded that there might be another shipment but the price had not been confirmed. Sarmiento said that some had been offered but it had lost some current. Chucho replied that about seventy were needed

and they discussed the price. (No. 154, 7/2/74).

At 7:00 pm. Sarmiento, Mario and Rodriguez and a woman exited 61-25 98th Street and got into a car. They made several stops and then returned to the apartment. At about 1:25 am. Sarmiento left and went to Manhattan (4962-4963).

On July 5th, at 4:10 pm. Libardo Gill and a man carrying a brown bag exited 7034 Broadway in Queens and entered a car. About 5:00 pm. Sarmiento exited the same house and went by cab to the Rodriguez apartment (4965-4966). At 6:04 pm. Sarmiento called Father Mejia from there. Sarmiento asked him if he had anybody who wanted to buy some first class grass for cattle. Father Mejia told him he would see. (No. 382, 7/5/74).

On July 6th at 7:45 pm. Sarmiento and Ruben Roldan arrived at 48-72 37th Street in Queens. Sarmiento went into the house and a few minutes later came out carrying a large box about the size of a portable television. He placed the box in the car and they drove to 327 West 30th Street in Manhattan. There he removed the box from the car and entered the building. Ruben Roldan entered a short time later (5002-5005).

On July 8th at 2:20 pm. Sarmiento left the Embassy Hotel and went by cab to a house located at 48-72 37th Street in Queens. He entered the house



(5161-5162). About two hours later Ruben Roldan arrived by car and Sarmiento exited the house carrying a large carton about three feet by three feet in size. He placed the box in the trunk and they drove to 445 West 48th Street in Manhattan. There Sarmiento left the car with a small box and entered the building. Roldan parked the car and then entered the building also. A little while later they left the building and drove away (5161-5164). At 7:54 pm. Sarmiento called Mario Rodriguez and Rodriguez told him about a problem concerning a few little things getting sick. Rodriguez then spoke to El Nata about meeting later and Sarmiento said that he would be there also. (No. 551, 7/8/74).

On July 13th at 2:50 pm. Sarmiento telephoned Rodriguez and asked him if the kid had arrived. Rodriguez told him that the boy probably had become sick because he had called and said he was arriving at 8:45 pm. and that was the last time that he was heard from. Rodriguez said he could not make an inquiry because he did not know the name. (No. 834, 7/13/74).

On August 15th, at about 5:40 pm. at 86th Street and Roosevelt Avenue in Queens Sarmiento and Arturo Gonzalez had a conversation. After the conversation they both entered a car and drove to National Street and Corona Avenue. This location was about a

half block from 99-03 Corona Avenue.

On August 29th at about 8:45 pm. Sarmiento exited Apartment 6A at 327 West 30th Street. He stood in the hallway; looked to his left; looked to his right; looked at the floor; and then looked at the door of the apartment. He then went back inside the apartment (5415-5416).

Later that evening at about 10:50 pm. Mario and Estella Rodriguez entered Apartment 6A at 327 West 30th Street in Manhattan. At about 1:50 am. Mario, and Estella Rodriguez, Sarmiento and a man left the apartment (5274-5275).

On August 30th, at 11:10 pm. Sarmiento called the Rodriguez apartment. The telephone was answered by Oscar and he told Sarmiento that Mario was not there. (No. 587, 8/30/74).

On September 3rd, Sarmiento called a man at Apartment 6A, 327 West 30th Street in Manhattan and told him if any one called to give the caller Mario Rodriguez's number. (No. 750, 9/3/74). At 10:35 am. Sarmiento called Father Mejia and asked whether the child had come. Father Mejia replied affirmatively but told him that the child had brought nothing. Sarmiento asked if Father Mejia had some little things. (No. 754, 9/3/74).



At 1:15 pm. Sarmiento was walking back and forth on a pedestrian over-pass and entered 61-20 Grand Central Parkway (5378-5379).

At about 3:00 pm. Hugo Ramirez and Palitraque drove into a gas station on Colonial Street and Horace Hardening Boulevard in Queens. Hugo made a telephone call to Sarmiento at the Rodriguez apartment at 3:07 pm. (5379). About five minutes later Sarmiento met them on the side walk near 61-20 Grand Central Parkway. At this point they were arrested (5380).

Meanwhile law enforcement officials entered Sarmiento's apartment located on West 30th Street and Father Mejia's apartment on West 48th Street. Searches were conducted at both apartments and cocaine, marijuana, and various papers and documents were seized. (5720).

On September 5th, at 2:52 pm. Arturo Gonzalez called the Rodriguez apartment. Because Mario Rodriguez was unavailable he spoke to Oscar and they discussed the arrest of Sarmiento. Arturo then spoke to Rodriguez about Sarmiento's arrest and told him he had obtained a lawyer. (No. 893, 9/5/74).

### ISSUES PRESENTED

1. Was it error for the district court to deny Sarmiento's suppression motion without a hearing on the ground he lacked standing to bring the motion, where the motion recited that he had a possessory interest in the premises?

2. Did the district court, err in failing to declare a mistrial after Sarmiento's Sixth Amendment right of confrontation was violated by the improper use of a co-defendant's statement implicating him in the alleged conspiracy?

3. Did the variance between the allegation of a single conspiracy in the indictment and proof of multiple conspiracies at trial substantially prejudice Sarmiento?

4. Did the improper comments by the prosecution in his opening statement, coupled with the inflammatory and unfair closing remarks, amount to prosecutorial misconduct, depriving Sarmiento of a fair trial.

5. Whether errors in the Court's charge to the jury require reversal?



POINT I

THE DISTRICT COURT ERRED IN DENY-  
ING WITHOUT A HEARING APPELLANT  
SARMIENTO'S MOTION TO SUPPRESS THE  
EVIDENCE SEIZED FROM APARTMENT 6A  
AT 327 WEST 30TH STREET ON THE  
GROUND THAT HE LACKED STANDING TO  
OBJECT TO THE SEIZURE.

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On October 10, 1975, prior to trial, Sarmiento moved to suppress certain evidence seized from apartment 6A at 327 West 30th Street. The motion recited that on September 3, 1974, at about 4:00 p.m., New York City Police Officers entered apartment 6A by breaking and entering through a rear window. The entry was made without a warrant and without consent. Immediately after the entry the police conducted a warrantless preliminary search of the apartment seizing a quantity of money, shoes with cocaine residue on them, and a brick of marijuana. Later a search warrant arrived and the police conducted another search and seized additional money and marijuana, a quantity of cocaine, and some books and records. Sarmiento asserted that it was the government's position that he was an inhabitant and had a possessory interest in the apartment. He claimed that the government's evidence would show that he utilized the apartment and was

seen entering and leaving it on a number of occasions.

(165a-169a)

Several days after the motion was filed the district court denied it without holding any type of hearing, determining that Sarmiento lacked standing to bring the motion. The court's determination was based on its acceptance of the government's unsworn claim that the evidence would not show that Sarmiento had a possessory interest in the apartment.

During the trial Sarmiento renewed his motion and objected to the admission into evidence of the items seized from the apartment. The motion was again denied and the objection was overruled (5717-5719) on the ground that Sarmiento lacked standing.

It is not disputed that standing is necessary to contest a search and seizure. See: Brown v. United States 411 U.S. 223 (1973). Brown, was a case where defendants had been charged with transporting stolen goods and conspiracy to transport stolen goods in interstate commerce. They sought to suppress certain evidence that had been illegally seized but in so doing did not allege any proprietary or possessory interest in the premises searched or the evidence seized. The defendants also never presented the



district court with evidence of any such interest.

The Supreme Court held that the defendants had no standing either actual or automatic to contest the search. Automatic standing did not exist because possession of the goods was not an element of the crime charged and the government's case did not depend on the defendant's possession of the goods at the time they were seized.

The Court's discussion of standing is applicable in demonstrating how the district court erred in denying Sarmiento's motion. His motion alleged that the evidence would show that he was an inhabitant of the apartment. It stated that Sarmiento entered and left the apartment on a number of occasions. It was reasonable to infer as a result of this that he had a possessory interest in the apartment. The government denied this but the evidence at the trial showed otherwise. On July 6th, after Sarmiento had returned from Florida and was no longer living at 215 East 64th Street he and Ruben Roldan entered 327 West 30th Street with a box (5002-5005). On August 29th, at 8:45 p.m., Sarmiento was seen walking out of apartment 6A, standing in the hallway for several minutes looking in various directions and then going back inside the apartment. Later at 10:50 p.m., Mario Rodriguez and

his wife entered the apartment and about three hours later they and Sarmiento left (5415-5416, 5274-5275). This was several days before the search. On the day the search was conducted Sarmiento called the apartment and told the person there to tell anyone that called to call him at Mario's. (No. 750, 9/3/74). These facts were sufficient to evidence Sarmiento's right to bring the motion. It was not necessary to show that Sarmiento had exclusive use of the apartment because standing is not diminished when an apartment is used jointly with other persons. United States v. Jeffers, infra, Baker v. United States, 401 F.2d 958, 982-984 (CA DC 1968). The fact that Sarmiento may not have resided at the apartment does not defeat standing because standing exists even if an apartment is not used as a residence. United States v. Wilcox, 357 F.Supp. 514, 517-518 (E.D.Pa.1973). All that is necessary is that an individual have an expectation of a right of privacy.

No court has ever required that a defendant expressly allege a proprietary or possessory interest in the premises searched. And no court has ever required an individual to be physically present when a search and seizure occurs. See: United States v. Jeffers, 342 U.S.



48, 52 (1951). It is sufficient that the district court be presented with evidence of such an interest or permit the defendant to prove such an interest at a hearing. Brown v. United States, supra, 226, 229. In Brown, the petitioners were awarded a full hearing on the question of standing. In the instant case the district court accepted the government's claim and never permitted Sarmiento to prove his interest at a hearing.

The government took advantage of contradictory positions. It denied that the evidence showed Sarmiento's interest in the apartment for standing purposes and then presented evidence at the trial to show his connection with the apartment. This is contrary to settled law. The government can not be permitted to take advantage of contradictory positions. The fact that the crime involved was conspiracy does not change the result. The conspiracy was to import, possess and distribute cocaine. While possession is not an essential element of conspiracy, here, the government attempted to demonstrate possession to the jury when it sought to connect Sarmiento with the apartment on West 30th Street and its contents on the day of the search. Unlike Brown, the conspiracy here included the day of the search. Cf. Brown v. United States, supra, 229.

This is not a case where the motion is meritless. The propriety of the search was fully explored at a hearing before the Supreme Court of the State of New York, New York County. People v. Salazar, 83 Misc. 2d 922 (1975). That court in a well-reasoned opinion found that the search of the West 30th Street apartment and the seizure of the evidence was improper and suppressed the evidence.

The district court's error in denying the motion can not be considered harmless. Substantial amounts of seized drugs and money and documents were admitted in evidence. The case against Sarmiento was entirely circumstantial and this evidence tended to support other evidence against him.



POINT II

THE DISTRICT COURT ERRED IN  
FAILING TO DECLARE A MISTRIAL  
AFTER APPELLANT SARMIENTO'S  
RIGHT OF CONFRONTATION  
GUARANTEED BY THE SIXTH  
AMENDMENT WAS VIOLATED BY THE  
IMPROPER USE OF A CO-DEFENDANT'S  
STATEMENT IMPLICATING HIM IN  
THE ALLEGED CONSPIRACY.

During the government's direct case a post arrest statement of the defendant Julian Carrion Arco was admitted into evidence through the testimony of Detective Vincent Palazzotto. Prior to testifying Detective Palazzotto was instructed not to mention the name of any defendant on trial so as to avoid violating the confrontation clause of the Sixth Amendment (6641, 6678-6680, 6707-6708). See: Bruton v. United States, 391 U.S. 123 (1968). During cross examination by Arco's counsel Detective Palazzotto violated these instructions and in a non-responsive answer to a question said that "others" besides "the two Bravo brothers and Bernardo Roldan were very big in narcotics" (6706). He said that defendant Sarmiento was one of these other persons (6707). An immediate objection was made which was sustained and the jury was told to disregard the answer (6707). At

side bar, motions for mistrials were made based on Bruton v. United States. They were denied by the court (6707-6711).

At the resumption of Detective Palazzotto's testimony, in the presence of the jury, the court said it was not going to take any statement concerning other defendants in the case. The court instructed him to limit his testimony to statements about Arco and no one else and if he could not answer that way to say, "I cannot answer that question" (6712-6713). Immediately thereafter in response to whether other statements were made by Arco Detective Palazzotto said, "I cannot answer that question" (6713). Based upon the court's instruction and the witness' response that he could not answer, additional mistrial motions were made on the ground that the Bruton rule had been further violated (6723 6725). These motions were denied and the trial was recessed for the day.

When the case resumed the next day the court gave as its reason for denying the motions for mistrial (1) that the Bruton rule was distinguishable (2) that the evidence was not crucial to the government's case; (4) that the question which elicited the improper answer was asked by a defense lawyer; and (5) the answer was



improper (6741-6742). The jury was then instructed:

"THE COURT: good morning, members of the jury.

At the tail end of the day yesterday this witness was asked a question about whether the person whom he was interrogating mentioned anyone else. He did name someone. At that point and time there was an objection and I sustained the objection.

This is very crucial to your duties. I want to bring to your attention that you, of course, know that when you were selected each of you took a second oath-the first one, you will recall, was that you were going to tell the truth, in effect, to your qualifications. The second oath was that you would try this case upon the evidence as adduced here in the courtroom and the law as given to you by the Judge.

I call your attention back to that oath. If you remember the oath, it said, 'Do you swear that you will do that?'

The old form of that oath was "Do you swear in the presence of the ever living God that you will live up to your promise?" It is just as solemn as that now and it is just as important now.

Evidence does not include anything which the court strikes out. The court has stricken this particular item from this evidence. You may not consider it. If in any way you do so, you are stultifying your oath as a juror, and you are committing a wrong. So you will erase

this incident from your mind and when you decide the case you will make no reference to it in any shape or form. You will please live up to your oath and perform your functions as directed by the court." (6744-6746).

The district court was in error in denying the mistrial motions based on a violation of the Sixth Amendment's confrontation clause. Bruton v. United States, 391 U.S. 123 (1968).

Since Bruton it has been clear that a defendant's right of confrontation is denied where post-arrest statements of a co-defendant inculcating him are admitted into evidence. The effect of this denial of confrontation cannot be avoided by jury instructions not to consider the inculpatory statements. *Id.* at 128.

In the instant case the statement of the defendant Arco that Sarmiento was very big in narcotics certainly fell within the purview of Bruton. It was made by a co-defendant and directly implicated Sarmiento in the narcotics business of the Bravo brothers and Bernardo Roldan. This was exactly what the government was trying to prove during the eleven weeks of trial. The prejudice created by the admission of this evidence was not cured by the



district court's instructions to the jury to disregard the statement immediately after it was made. Nor was the prejudice cured by the court's instructions to the jury the next day.

In addressing itself to this situation in Bruton the Court quoted from Mr. Justice Jackson's concurring opinion in Krulewitch v. United States, 336 U.S. 440 that:

"The naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction."

The Bruton decision also acknowledged that this circuit was of the same view. United States v. Bozza, 365 F.2d 206, 215 (CA2 1966). The heart of Sarmiento's defense was that he was not involved in any cocaine trafficking but that the conversations and meetings were simply innocent activity. Arco's statement was the only thing that directly contradicted this. It would have been impossible for the jury to disregard Arco's statement.

The district court's finding that at the time the statement was admitted the evidence against Sarmiento was overwhelming thereby causing the admission of the statement to be harmless error was clearly erroneous. While numerous telephone calls between Sarmiento and

others had been presented to the jury, in not one of them had drugs or narcotics been specifically mentioned. Granted that it was the government's theory that the discussions of cocaine were disguised by using code words but there was never any evidence, expert or otherwise as to whether code words were used in Sarmiento's conversations and if they were what they meant. Likewise there was no direct evidence that the meetings between Sarmiento and the other defendants involved criminal activity. In this regard no meeting involving Sarmiento was ever related to a telephone conversation and visa versa. A government's case against Sarmiento was based purely on circumstantial evidence.

It is recognized that there are occasions where the evidence of guilt is overwhelming that a Bruton error can be deemed harmless. Brown v. United States, 411 U.S. 223, 230-232 (1973); Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969). In these three cases the defendants themselves all confessed to committing the crime charged and these confessions were admitted in evidence against them. In the Brown case, in addition to the confession, police officers actually saw the defendant participate in the theft of the



goods. In all the cases the evidence which the court deemed overwhelming was direct and not circumstantial and that is where the distinguishing feature lies. Direct evidence by its very nature leaves nothing for the jury's determination while the jury in considering circumstantial evidence must draw inferences before reaching a conclusion. In reaching its conclusion the jury has to choose between inferences consistent with innocence and inferences consistent with guilt. In the confines of harmless error and the violation of a constitutional right, circumstantial evidence is of a lesser quality than direct evidence. The Supreme Court in Harrington v. California, supra, recognized this when it stated at page 254:

"The case against Harrington was not woven from circumstantial evidence."

In the instant case the only direct evidence of Sarmiento's participation in the conspiracy was defendant Arco's statement.

The district court's reliance upon the fact that it was a defense attorney who asked the question which elicited Arco's statement that Sarmiento was involved in the narcotics business in denying the motions for a mistrial was also in error. Prior to the testimony of Detective Palazzotto all counsel and the court determined that the

"person" would be used in place of Sarmiento's name and Detective Palazzotto was so informed. In addition to this instruction, however, and to the surprise of everyone, counsel for the government instructed Palazzotto in effect that he could mention Sarmiento's name on cross examination. (6708). This additional instruction was in direct violation of what all counsel and the court had discussed and in direct violation of Bruton. The government cannot claim now the benefit of an improper instruction that it gave and the district court cannot discount the error because it arose on cross examination.

The other attempts by the district court to prevent further error in reality compounded the error already made. When Detective Palazzotto's testimony resumed after Sarmiento was mentioned as being involved, the district court told the witness in the presence of the jury:

"THE COURT: I am not going to take any statement concerning any other defendants in this case. If there is in fact statements about anyone else, you are to limit yourself to this individual Arco

\* \* \* \* \*



I do not want any testimony from you involving anyone else. When you answer a question, keep that in mind. This statement is only binding on Arco alone, on himself alone,., and does not rub off on any other defendant.

Q. Tell us what said.

THE COURT: If you cannot answer that question within the rule the Court has put down, you simply say, 'I cannot answer that question.'

A. I cannot answer that question."

It is obvious that Palazzotto's answer that he could not answer the question left the jury with the assumption that Arco had mentioned Sarmiento and other defendants on trial in his interview with the government.

It is submitted that the error that occurred was not harmless. It was the only direct evidence that linked Sarmiento to any illegal activity. The motion for mistrial should have been granted even if it meant aborting an 11-week trial (6710). Violations of constitutional rights do not diminish in importance when they occur near the end of a long trial.

POINT III

SARMIENTO WAS PREJUDICED BE-  
CAUSE OF THE VARIANCE RESULTING  
FROM PROOF OF MULTIPLE CONSPIR-  
ACIES.

Appellants in their joint brief have demonstrated the existence of three separate and distinct conspiracies and the prejudice to appellants that resulted from their joinder. Sarmiento was not a member nor was he connected in any way with either the New York conspiracy involving Edgar Restrepo and Jose Cabrera or the Florida conspiracy involving William Andreis and his associates. He was never identified as being involved and his name was never mentioned nor was he referred to in any way.

Because of the existence of these two conspiracies of which Sarmiento was not a part he suffered substantial prejudice by their inclusion in this case. The mere admission in evidence of proof concerning the first two conspiracies was prejudice in itself. This prejudice is presumed from the spill over effect that is created by the evidence necessary to prove the two unrelated conspiracies.

The jury was forced to sit through weeks of hearing witnesses testify about numerous cocaine dealings none of which had anything to do with Sarmiento.



In addition the jury was presented with large quantities of cocaine which were completely unrelated to Sarmiento. It must be remembered that the government's case against Sarmiento was circumstantial with their being no direct evidence of his actual possession of any cocaine. The evidence concerning the first two unrelated conspiracies so poisoned the mines of the jury that when the time came to hear evidence about Sarmiento it would have been difficult for them not to believe that he was also involved.

This entire situation could have been prevented if the district court had granted the motions for severance that were made after the evidence concerning the first two conspiracies had been presented. It was suggested that after a severance another jury could have been immediately selected to try the defendants involved in the third conspiracy. (2783-2784). The failure to do so deprived Sarmiento of a fair trial.

POINT IV

THE IMPROPER COMMENTS BY THE  
PROSECUTION IN THE OPENING  
STATEMENT COUPLED WITH THE  
INFLAMMATORY AND UNFAIR CLOSING  
REMARKS OF THE PROSECUTION  
AMOUNTED TO PROSECUTORIAL  
MISCONDUCT AND DEPRIVED SAR-  
MIENTO OF A FAIR TRIAL

The court is respectfully referred to  
Point III of Appellant Leon Velez's brief.



POINT V

FUNDAMENTAL ERRORS OF THE  
COURT'S CHARGE TO THE JURY  
REQUIRE REVERSAL

The court is respectfully referred to  
Point IV of Appellant Leon Velez's brief.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

Paul E. Warburgh, Jr.  
Attorney for Appellant  
Sarmiento



AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK }  
COUNTY OF New York } SS.:

Floristeane Anthony

being duly sworn, deposes and says; that deponent  
is not a party to the action, is over 18 years of age  
and resides at 122 E. 42nd St.

That on the 11th day of June 1976

deponent served the within appellant's  
brief

upon Robert B. Fiske, United States  
Attorney,

attorney(s) for United States

in this action, at 1 St. Andrews Plaza  
New York, N.Y. 10007  
the address designated by said attorney(s) for that  
purpose by depositing a true copy of same enclosed  
in a postpaid properly addressed wrapper, in - a  
post office - official depository under the ex-  
clusive care and custody of the United States post  
office department within New York State.

Sworn to before me,

this 11<sup>th</sup> day of June 1976

*Paul F. Warburgh, Jr.*

PAUL F. WARBURGH, JR.

NOTARY PUBLIC; STATE OF NEW YORK

NO. 52-9528430

QUALIFIED IN SUFFOLK COUNTY

TERM EXPIRES 3-30-78